BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES D. STOKES	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,013,291
HIEDELBERG USA	)	
Respondent	)	
AND	)	
	)	
KEMPER INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Both claimant and respondent appeal the March 22, 2005 Award of Administrative Law Judge Steven J. Howard. The Appeals Board (Board) heard oral argument on July 27, 2005.

APPEARANCES

Claimant appeared by his attorney, Kevin J. Kruse of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Michelle Daum Haskins of Kansas City, Missouri.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge with the following modifications. The parties acknowledge claimant was paid 41.86 weeks temporary total disability compensation at the rate of $417 per week totaling $17,454.42. This covered the period July 8, 2002, through April 30, 2003. The parties agreed at oral argument before the Board that the above dates comprise 42.29 actual weeks of time. However, no additional temporary total disability compensation was alleged or proven. The parties affirm the original stipulation that claimant was entitled to 41.86 weeks temporary total disability compensation at the above rate. (The Board noted 41.86 weeks at the rate of $417 calculates to $17,455.62, not $17,454.42. But the parties stipulate the total paid was $17,454.42.) The parties further agree that the task loss opinion of Truett L. Swaim, M.D., wherein claimant was found to have lost the ability to perform fourteen of twenty-two tasks, is a 64 percent task loss, rather than the 73.7 percent listed in the Award. The parties further agree that

claimant's average weekly wage of $898.94 should also include $13.20 bonus time, which computes to $912.14 rather than $912.09 as listed in the Award. However, even with the above stipulation, the average weekly wage remains in dispute.

ISSUES

1. What is claimant's average weekly wage both for the date of injury and during the periods of post-injury employment?

2. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working for respondent as an auxiliary feed technician in July 1998, installing and repairing conveyor systems. On May 3, 2002, claimant suffered injury when, while lying on the floor working above him, he felt discomfort as he was arising from the floor. Claimant testified he felt a knot in his left shoulder blade. Claimant contacted his employer and was ultimately provided authorized medical care with Vito J. Carabetta, M.D., who performed an EMG nerve conduction study which was read as abnormal. Claimant also underwent an MRI, which revealed a herniated disc at C6-7. Claimant was referred to Chris Wilson, M.D., who treated claimant, including administering three epidural injections. Claimant was then referred to board certified neurosurgeon Stephen L. Reintjes, M.D. Dr. Reintjes treated claimant with conservative therapy, including physical therapy, but ultimately performed surgery on claimant which was described as a left C7 foraminotomy with micro dissection. Claimant's condition was improved with surgery, although claimant testified the pain did not completely disappear. Dr. Reintjes released claimant from his treatment on or about April 30, 2003, with permanent work restrictions. Claimant was also treated for a frozen shoulder, which developed after the surgery. Claimant was referred to T. Samuelson, M.D., for treatment for that condition, including physical therapy and exercises. Claimant's left shoulder improved and he was provided no restrictions to the shoulder at the time of his release.

Claimant last worked for respondent in July of 2002. Respondent was unable to accommodate the restrictions placed upon him by Dr. Reintjes. Claimant underwent an extensive job search, sending out between sixty and one hundred resumes and applications to businesses where claimant felt his education, background and training could be utilized. Claimant first obtained employment with Manpower, working 40 hours a week at $8 per hour. The ALJ utilized a start date of December 1, 2003, for this job, although the record is unclear as to the exact day claimant began his employment. There was no objection by any of the parties to this date, and the Board will, therefore, utilize this same date in its award determination. Claimant continued working for Manpower through January 17, 2004. On approximately January 18, 2004, again a date utilized by the ALJ without objection by the parties, claimant obtained employment with Del Monte, running

machines that made dog and cat treats. In this job, claimant would periodically have to handle 50-pound bags of salt, flour and sugar, dumping the contents of the bags into a mixing vat four to six times per day. Claimant testified these 50-pound sacks, which exceeded his 35-pound weight limitation placed upon him by both Dr. Swaim and Dr. Reintjes, could be handled by placing the bag on a forklift and then raising the forklift to the appropriate level. Claimant could then grasp the bag in both hands, twisting and dumping the contents into the vats, thereby eliminating the necessity for claimant to have to pick up the entire 50 pounds. Claimant continued working for Del Monte until approximately October 1, 2004. On October 2, 2004, claimant obtained a job with the United States Postal Service which paid better wages and required less physical activity than the job with Del Monte. The record indicates claimant remains employed in that capacity.

As noted above, the parties have stipulated to an average weekly wage of $898.94, plus $13.20 bonus time. However, claimant's wage with respondent remains in dispute with regard to certain specific items and amounts. Claimant was paid $42 per day per diem, with no obligation to reimburse respondent if that money was not spent and no requirement that claimant provide any receipts associated with the utilization of those funds. Additionally, claimant was provided work shoes which were valued at $1.44 per week, safety glasses at $1.92 per week and uniforms at $2.60 per week. Claimant argues these amounts should all be included in claimant's average weekly wage during his employment with respondent.

With regard to claimant's employment at Del Monte, he started at $11.27 per hour, receiving a raise to $11.50 per hour on a date not designated in this record. Claimant was also provided $.60 night differential and earned $20,387.37 for the 10 months he was employed with Del Monte. The parties acknowledge claimant was provided $1.80 per week in life insurance, $4.23 per week in disability insurance and $137.58 per week in health and dental insurance costs. Claimant also argues entitlement to $2.88 per week in a shoe fund and $1.92 per week for safety glasses. With the amounts for shoes and safety glasses included, claimant's wage at Del Monte would compute to $608.41. Without the amounts for shoes and safety glasses, it would compute to $603.61.

Claimant's job at the United States Postal Service paid $15.81 per hour plus $1.12 per hour additional night pay. Claimant also received $59.07 per week in health insurance for a total claimed of $713.97 per week for the job with the United States Postal Service which began October 2, 2004.

Claimant was referred to board certified orthopedic surgeon Edward J. Prostic, M.D., for a court-ordered independent medical examination on January 19, 2004. Dr. Prostic, who examined claimant, diagnosed a posterior foraminotomy and a diskectomy. However, the medical notes of Dr. Reintjes and Dr. Reintjes' testimony indicate claimant did not undergo a diskectomy as Dr. Reintjes did not remove the disc, but merely repositioned it away from the spine. Claimant had upper extremity complaints including what Dr. Prostic

discussed as possible thoracic outlet syndrome, although he acknowledged claimant did not have the physical findings. He agreed that if claimant had thoracic outlet syndrome, it was probably a residual of the frozen shoulder which developed after the surgery. Dr. Prostic opined claimant had a 15 percent functional impairment to the body as a whole based upon the fourth edition of the AMA *Guides.*[1] He felt claimant had a good result from the surgery with substantial relief. In reviewing the task list [2] provided showing claimant's tasks performed over the 15 years preceding the accident, Dr. Prostic found claimant to have suffered no task loss as a result of this injury. He additionally reported claimant required no work restrictions as a result of the May 3, 2002 injury. However, Dr. Prostic acknowledged that claimant would be able to return to his employment with respondent, but with certain accommodations being required. He further acknowledged claimant was unable to do the most physical part of the job, eight hours a day, for a career.

Dr. Reintjes, claimant's treating physician, found claimant to have suffered a 15 percent impairment to the body as a whole for claimant's neck injury based upon the fourth edition of the AMA *Guides.*[3] He provided work restrictions which limited claimant to lifting less than 35 pounds and advised claimant perform no overhead work. When provided the list of twenty-two tasks provided by vocational expert Mary Titterington, he opined claimant unable to perform sixteen of the twenty-two tasks, for a 73 percent task loss. He provided no restrictions to claimant's shoulders, finding that Dr. Samuelson (to whom claimant was referred for left shoulder treatment) would be the more knowledgeable in that regard. It is noted that while Dr. Samuelson's records are not in the record, it was discussed that Dr. Samuelson provided no restrictions on claimant's left shoulder.

Claimant was referred for a medical examination to board certified orthopedic surgeon Truett L. Swaim, M.D. Dr. Swaim examined claimant on August 11, 2003, at claimant's attorney's request. Dr. Swaim also diagnosed claimant with post-surgical foraminotomy, diskectomy and decompression. Again, it is noted claimant did not undergo a diskectomy. Dr. Swaim also discussed a left C6-7 foraminotomy with micro dissection, which is different than a diskectomy. He further discussed the fact that claimant developed a frozen shoulder on the left side following surgery and was sent to physical therapy with some resulting improvement.

Claimant underwent a functional capacities evaluation on April 29, 2003, which test was utilized by Dr. Swaim in his examination and opinions. Dr. Swaim assessed claimant a 15 percent impairment to the whole person for the neck injuries and a 6 percent impairment for the decreased range of motion in claimant's left shoulder, which calculates

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[2] The task list prepared by vocational expert Mary Titterington.

[3] AMA *Guides* (4th ed.).

to a 4 percent whole person impairment, which, when combined, equates to an 18 percent whole person impairment. He has also assessed claimant a 6 percent whole person impairment for the ulnar neuropathy of the left elbow, all of which, when combined, results in a 23 percent whole person impairment on a functional basis, all pursuant to the fourth edition of the AMA *Guides*.[4]

Dr. Swaim restricted claimant to light- to medium-level work, allowing 15 to 35 pounds lifting on an occasional basis, 5 to 15 pounds on a frequent basis and up to 5 pounds on a constant basis. He warned that claimant should avoid prolonged repetitive or forceful use of the upper extremities above shoulder height and to avoid repetitive and forceful use of the upper extremities. Dr. Swaim also reviewed the vocational task list of Mary Titterington, finding claimant unable to perform fourteen of twenty-two tasks, for a 64 percent task loss.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[5]

Claimant's average weekly wage with respondent has been stipulated to with the exception of the value of certain safety equipment items and the per diem being provided by respondent. K.S.A. 2001 Supp. 44-511(a) states in part:

> (2) The term "additional compensation" shall include and mean only the following: . . . (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; . . . .[6]

In this instance, it is acknowledged claimant was paid $42 per day per diem with no requirement that claimant provide receipts to justify this or reimburse respondent should that money not be spent. Under K.S.A. 2001 Supp. 44-511, the Board finds that the $210 per week value of the per diem should be added claimant's average weekly wage for the injuries suffered on May 3, 2002.

Claimant's attorney also argues that the value of certain items, including work shoes, safety glasses and uniforms, be added to claimant's average weekly wage for purposes of this award. However, claimant acknowledged at oral argument there is no provision under K.S.A. 2001 Supp. 44-511 which allows for the addition of the value of

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[4] AMA *Guides* (4th ed.).

[5] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

[6] K.S.A. 2001 Supp. 44-511(a)(2).

such equipment to claimant's average weekly wage. Additionally, the Board was unable to find any case law which allows the addition of the value of safety equipment, safety glasses or uniforms to be utilized as part of the average weekly wage of a claimant.[7]

The Board, therefore, finds the value of those items are not to be included in claimant's average weekly wage. This results in an average weekly wage of $1,122.14, comprised of $898.94 as stipulated by the parties, $13.20 bonus and $210 per week per diem.

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[8]

The Board finds, in this instance, claimant has suffered a 23 percent impairment to the body as a whole as determined by Dr. Swaim. The 15 percent impairment to the cervical spine was assessed by all three physicians who testified in this matter, including Dr. Prostic, Dr. Swaim and Dr. Reintjes. However, Dr. Reintjes acknowledged that he did not evaluate claimant's shoulder, leaving that to the doctor who provided claimant's treatment. Dr. Prostic, on the other hand, found no restrictions to be placed upon claimant for any of claimant's conditions and determined that claimant's shoulder injury had resolved. Dr. Swaim found that, while claimant's shoulder condition had improved, he still had significant difficulties with his left upper extremity, ultimately assessing claimant a 23 percent impairment to the body as a whole for the injuries suffered with respondent, including the results of the frozen shoulder syndrome. The Board finds Dr. Swaim's opinion to be the most credible in this record and awards claimant a 23 percent impairment to the body as a whole.

K.S.A. 44-510e defines permanent partial general disability as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

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[7] *Ridgway v. Board of Ford County Comm'rs*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987).

[8] K.S.A. 44-510e(a).

Three physicians were asked to comment on claimant's task loss in light of K.S.A. 44-510e. Dr. Prostic testified claimant had no task loss and no restrictions were required as a result of the surgeries performed and treatment provided for the May 3, 2002 injuries. However, even Dr. Prostic acknowledged that claimant would be able to return to work with respondent only with accommodation as there were certain physical tasks of claimant's previous job which he would be unable to perform in his current condition. The Board does not find Dr. Prostic's zero percent task opinion to be credible in this instance.

Both Dr. Swaim and Dr. Reintjes reviewed the task list of Mary Titterington, finding claimant to be unable to perform fourteen of twenty-two tasks and sixteen of twenty-two tasks respectively, for a 64 and 73 percent task loss respectively. The Board finds the opinions of neither Dr. Swaim nor Dr. Reintjes to be sufficiently convincing to negate the opinion of the other. Therefore, the Board averages the task loss opinions of the two physicians, which results in a 68.5 percent task loss for the injuries suffered by claimant.

With regard to the wage-loss aspect of claimant's injury, the Board must consider K.S.A. 44-510e in light of both *Foulk*[9] and *Copeland.*[10] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage to claimant. In this instance, respondent was unable to accommodate claimant's restrictions and, therefore, no accommodated job was offered. Therefore, *Foulk* does not apply in this instance.

Additionally, in *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage would be based upon the ability to earn wages, rather than actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[11]

The Board finds claimant made a good faith job search effort. Claimant last worked for respondent in July of 2002. Claimant was then provided nearly 42 weeks of temporary total disability compensation through April 30, 2003. Shortly thereafter, claimant began

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[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[11] Id. at 320.

seeking employment, sending out between sixty and one hundred applications. This resulted in claimant obtaining employment with Manpower on approximately December 1, 2003, earning $8 per hour for a 40-hour week. This equates to $320 which, when compared to claimant's average weekly wage of $1,122.14, results in a wage loss of 71 percent. Claimant's Manpower job ceased in January 2004, with claimant obtaining employment with Del Monte beginning approximately January 18, 2004, and working through October 1, 2004. During this time, claimant's average weekly wage equated to $603.61 which, when compared to claimant's date-of-accident average weekly wage, results in a wage loss of 46 percent. Thereafter, on October 2, 2004, claimant obtained work with the United States Postal Service, earning a wage of $713.97, which equates to a 36 percent wage loss.

For the period May 1, 2003, through November 30, 2003, a period of 30.57 weeks, claimant is entitled to a task loss as above computed of 68.5 percent and a 100 percent wage loss, for a work disability of 84.25 percent. Thereinafter, claimant's post-injury wage resulted in a wage loss of 71 percent for the period December 1, 2003, through January 17, 2004, a period of 6.86 weeks, for a 69.75 percent permanent partial general disability.

Thereinafter, beginning January 18, 2004, and continuing through October 1, 2004, claimant is entitled to a permanent partial general disability of 57.25 percent based upon a wage loss of 46 percent and a task loss of 68.5 percent. Effective October 2, 2004, claimant is entitled to a 52.25 percent permanent partial general disability based upon a 36 percent wage loss and a 68.5 percent task loss for a total award not to exceed $100,000 pursuant to K.S.A. 44-510f(a)(3).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated March 22, 2005, should be, and is hereby, modified, and claimant is awarded benefits for injuries suffered on May 3, 2002, while employed with respondent.

Claimant is entitled to 41.86 weeks temporary total disability compensation at the rate of $417 per week totaling $17,454.42. Thereafter, claimant is entitled to 30.57 weeks permanent partial general disability compensation at the rate of $417 per week totaling $12,747.69, from May 1, 2003, through November 30, 2003, for a 84.25 percent permanent partial general disability. Thereafter, claimant is entitled to an additional 6.86 weeks permanent partial general disability compensation at the rate of $417 per week totaling $2,860.62, from December 1, 2003, through January 17, 2004, for a 69.75 percent permanent partial general disability. Thereafter, claimant is entitled to an additional 36.86 weeks permanent partial general disability compensation at the rate of $417 per

week totaling $15,370.62, from January 18, 2004, through October 1, 2004, for a 57.25 percent permanent partial general disability. Thereinafter, beginning October 2, 2004, claimant is entitled to a 52.25 percent permanent partial general disability, making a total award not to exceed $100,000.00 pursuant to K.S.A. 44-510f.

As of August 2, 2005, claimant is entitled to 41.86 weeks temporary total disability compensation at the rate of $417 per week totaling $17,454.42, followed thereafter by 117.86 weeks permanent partial general disability compensation at the rate of $417 per week totaling $49,147.62, for a total due and owing of $66,602.04, which is ordered paid in one lump sum, minus any amounts previously paid.

Thereafter, the remaining balance of $33,397.96 shall be paid at the rate of $417 per week, for a total award not to exceed $100,000, until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of August 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kevin J. Kruse, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director